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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John F. Stewart,

Plaintiff,

No. CV-13-00508-PHX-DGC

ORDER

V.

Carolyn W. Colvin,
Acting Commissioner of Social Security.

Defendant.

Pursuant to 42 U.S.C. § 405(g), Plaintiff John F. Stewart seeks judicial review of the Commissioner's decision finding him not disabled. Doc. 11. For the reasons that follow, the Court will deny Plaintiff's motion.

I. Background.

Plaintiff applied for disability insurance benefits and supplemental security income on October 24, 2009, alleging disability beginning on June 1, 2008. Doc. 11 at 1-2. After a hearing on May 18, 2011, an Administrative Law Judge (“ALJ”) issued an opinion on July 28, 2011, finding Plaintiff not disabled. *Id.* at 2. Requests for review were twice denied by the Appeals Council, and the ALJ’s opinion became the Commissioner’s final decision. *Id.*

II. Legal Standard.

Defendant's decision to deny benefits will be vacated "only if it is not supported by substantial evidence or is based on legal error." *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006). "'Substantial evidence' means more than a mere scintilla, but

1 less than a preponderance, i.e., such relevant evidence as a reasonable mind might accept
 2 as adequate to support a conclusion.” *Id.* In determining whether the decision is
 3 supported by substantial evidence, the Court must consider the record as a whole,
 4 weighing both the evidence that supports the decision and the evidence that detracts from
 5 it. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). If there is sufficient evidence to
 6 support the Commissioner’s determination, the Court cannot substitute its own
 7 determination. *See Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990).

8 Determining whether a claimant is disabled involves a sequential five-step
 9 evaluation process. The claimant must show (1) he is not currently engaged in
 10 substantial gainful employment, (2) he has a severe physical or mental impairment, and
 11 (3) the impairment meets or equals a listed impairment or (4) his residual functional
 12 capacity (“RFC”) precludes him from performing his past work. If at any step the
 13 Commissioner determines that a claimant is or is not disabled, the analysis ends;
 14 otherwise it proceeds to step five. If the claimant establishes his burden through step
 15 four, the Commissioner bears the burden at step five of showing that the claimant has the
 16 RFC to perform other work that exists in substantial numbers in the national economy.
 17 *See* 20 C.F.R. § 404.1520(a)(4)(i)-(v).

18 **III. Analysis.**

19 Plaintiff contends that the ALJ’s decision is incorrect on two grounds. First, he
 20 argues that the ALJ failed to properly weigh the opinion of a treating physician. He also
 21 argues that the ALJ improperly discounted his subjective testimony. The Court will
 22 consider each argument in turn.

23 **A. Treating Physician Opinion.**

24 The Ninth Circuit distinguishes between the opinions of treating physicians,
 25 examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,
 26 830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating
 27 physician’s opinion and more weight to the opinion of an examining physician than to
 28 one of a non-examining physician. *See Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th

1 Cir. 1995); *see also* 20 C.F.R. § 404.1527(c)(2)-(6) (listing factors to be considered when
 2 evaluating opinion evidence, including length of examining or treating relationship,
 3 frequency of examination, consistency with the record, and support from objective
 4 evidence). The opinion of a treating or examining physician “can only be rejected for
 5 specific and legitimate reasons that are supported by substantial evidence in the record.”
 6 *Lester*, 81 F.3d at 830-31 (citing *Andrews*, 53 F.3d at 1043).

7 Plaintiff argues that Dr. Ryklin’s opinions should have been given controlling
 8 weight and that the ALJ failed to provide “clear and convincing” reasons for discounting
 9 them. Doc. 11 at 14-15. The ALJ found that Dr. Ryklin’s notes were “replete with
 10 comments about how great the [Plaintiff] is doing,” and that he released Plaintiff back to
 11 work immediately. A.R. 33. The ALJ cited several examples from Dr. Ryklin’s
 12 treatment records, noting that in April 2008 Plaintiff reported “close to 50%
 13 improvement, had less severe headaches, and was able to stop using pain medication.”
 14 *Id.* The ALJ further noted that Dr. Ryklin’s notes from October 2008 revealed that
 15 Plaintiff was “considerably improved” and Dr. Ryklin released him to full work duties.
 16 *Id.* The ALJ also noted that Dr. Ryklin’s treatment notes from June 2009 showed that
 17 Plaintiff reported 70% improvement “with particular improvement in sitting, standing,
 18 bending, and sleeping.” *Id.* Additionally, she noted that in October 2009 Dr. Ryklin
 19 recorded that Plaintiff’s medication “was controlling [his] pain reasonably well [and] that
 20 he had no side effects.” *Id.* The ALJ concluded that these examples from Dr. Ryklin’s
 21 notes conflicted with a “Headache Impairment Questionnaire” completed by Dr. Ryklin
 22 in February 2010. *Id.* at 34. The ALJ gave this questionnaire little weight because it was
 23 a “fill-in-the blanks, check-blocks form” that “lacked bases for conclusions.” *Id.*

24 Plaintiff’s argument that the ALJ was required to give “clear and convincing”
 25 reasons for discounting Dr. Ryklin’s opinion is incorrect. An ALJ must provide clear and
 26 convincing reasons for rejecting the opinion of a treating physician that is not
 27 contradicted. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Dr. Ryklin’s opinion
 28 was contradicted by those of other treating physicians such as Drs. Cowley and

1 Benjamin, and the ALJ clearly noted that Dr. Ryklin's own treatment notes and other
2 documents were internally inconsistent. The ALJ is not required to give controlling
3 weight to an opinion that is not well-supported and inconsistent with other evidence in
4 the record. *See* 20 C.F.R. § 404-1527(d)(2). The Court finds no error in the weight
5 assigned to Dr. Ryklin's opinions by the ALJ and further finds that the ALJ's assessment
6 of these opinions is supported by several specific and legitimate reasons as outlined
7 above. *Lester*, 81 F.3d at 830-31.

8 **B. Plaintiff's Subjective Testimony.**

9 The ALJ must engage in a two-step analysis to evaluate the credibility of a
10 claimant's subjective testimony. "First, the ALJ must determine whether the claimant
11 has presented objective medical evidence of an underlying impairment 'which could
12 reasonably be expected to produce the pain or other symptoms alleged.'" *Lingenfelter v.*
13 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341,
14 344 (9th Cir. 1991) (en banc)). If the claimant meets this first test, and there is no
15 evidence of malingering, then the ALJ "can reject the claimant's testimony about the
16 severity of her symptoms only by offering specific, clear and convincing reasons for
17 doing so." *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ may consider
18 the following factors when weighing the claimant's credibility: the claimant's reputation
19 for truthfulness, inconsistencies either in the claimant's testimony or between his
20 testimony and his conduct, the claimant's daily activities, his work record, and testimony
21 from physicians and third parties concerning the nature, severity, and effect of the
22 symptoms of which claimant complains. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th
23 Cir. 2002) (citing *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)).

24 Plaintiff argues that the ALJ failed to provide clear and convincing reasons for
25 finding him not credible. The Court disagrees. The ALJ noted that Plaintiff reported
26 being fired from Subway in 2008 because of excessive medical appointments, but that
27 Plaintiff only had four appointments during the time he worked at Subway. A.R. at 36.
28 She noted that the evidence – the end of Plaintiff's employment at Subway and the timing

1 of medical appointments – seemed to indicate that Plaintiff was in Washington visiting
 2 his parents for two to three months in 2008 as opposed to the two to three weeks Plaintiff
 3 claimed to have been there. *Id.* She further noted Plaintiff's claim that bright lights and
 4 noise bothered him, and yet he had no difficulty in the brightly-lit hearing room and his
 5 neighbor reported that Plaintiff kept the TV on all day, even when he was not watching it.
 6 *Id.* at 36-37. The ALJ found the “most telling” fact to be Plaintiff's own insistence that
 7 he was ready and willing to work, and the opinions of two treating physicians that he
 8 could do so. *Id.* at 37. She finally noted that there was no evidence demonstrating that
 9 Plaintiff's condition had worsened since 2010, that he had told his psychiatrist in March
 10 2010 that he had “no complaints,” and that he had gotten a computer and was playing his
 11 guitar. *Id.* at 37. The Court finds that these reasons to be specific, clear, and convincing
 12 as required by the Ninth Circuit. *Smolen*, 80 F.3d at 1284.

13 Plaintiff argues that the ALJ improperly relied on her own observations of Plaintiff
 14 as a basis for discounting his testimony. Doc. 11 at 18. This is incorrect. Although an
 15 ALJ may not rely solely on her personal observations to discount a claimant's credibility,
 16 her personal observations may be used “in the overall evaluation of the credibility of the
 17 individual's statements.” *Orn v. Astrue*, 495 F.3d 626, 639 (9th Cir. 2007) (citing S.S.R.
 18 96-7p at 8). As discussed above, the ALJ provided ample reasons for her assessment of
 19 Plaintiff's credibility. That she also included a personal observation does not constitute
 20 legal error.

21 **IT IS ORDERED** that Plaintiff's motion is **denied**. The Clerk shall terminate this
 22 action.

23 Dated this 21st day of November, 2013.

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David G. Campbell
United States District Judge